STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2013
v	No. 310734 Charlevoix Circuit Court
CORY WAYNE KARLSKIN, Defendant-Appellant.	LC No. 11-095510-FC

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(2)(b) (victim under 13), two counts of second-degree CSC, MCL 750.520c(2)(b) (victim under 13), and child sexually abusive activity, MCL 750.145c(2). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 25 to 50 years' imprisonment for each first-degree CSC conviction, 15 to 22½ years for each second-degree CSC conviction, and 20 to 30 years for the child sexually abusive activity conviction. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant lived in a tent on Alyssa Kibbe's property but he would charge his cellular phone in Kibbe's home. Kibbe testified that her children told her they had found pictures of naked people on defendant's cell phone. After receiving this information, Kibbe looked at defendant's phone and confirmed that there were naked images, some of which appeared to be a young girl. She called the police and turned the phone over to them. Police officers placed the cellular phone in a police cruiser until a search warrant was obtained.

The victim testified that while she visited her aunt (Kibbe's neighbor), several children would play in defendant's tent. The victim testified that on one occasion, defendant touched her buttocks inside her clothes while the victim was sitting next to defendant in the tent. Later, defendant touched her buttocks over her clothes while she was exiting the tent. The victim testified that later that night she and her sisters were sleeping on the living room floor when defendant sat beside her and pulled down her pajama pants and underwear. The victim described feeling "like a—a wet—like a warm, wet scratchy on my private spot," and clarified that she meant defendant's tongue going into her vagina. She and defendant went onto the porch swing, where defendant asked to take a picture of her "private spot," then persisted in doing so over her

objections. According to the victim, defendant then carried her to the tent, where he pulled her pants down and again penetrated her vagina with his tongue. The victim went back into the house and entered a bedroom. She testified that defendant entered the room, closed the door, removed her clothes and his pants, positioned himself on top of her, and then unsuccessfully tried to put "his private spot" into her "private."

Defendant testified on his own behalf, and denied all charges. He also presented an alibi witness, who testified that defendant was working on the days the incidents took place.

The trial court granted a motion to dismiss a charge of first-degree CSC based on a theory of digital-anal penetration. The jury returned a verdict of guilty on the remaining charges. Defendant now appeals as of right.[1]

II. GREAT WEIGHT OF THE EVIDENCE

Appellate counsel's sole issue on appeal is that the verdicts were against the great weight of the evidence.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). A new trial on this ground is generally permissible when the evidence does not reasonably support the verdict and the verdict was "more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id.* However the trial court may not normally grant a new trial on the basis of credibility determinations because it may not "substitute its view of the credibility" for that of the jurors. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Rather, "it is for the trier of fact to assess the credibility of witnesses and the weight to be given the evidence." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

Defendant argues that the verdict was unreliable because the victim's testimony was seriously impeached and the case was marked by uncertainties and discrepancies. To support these arguments defendant relies on defendant's alibi witness and his lack of exclusive possession of his cell phone. Defendant also points out that there were others present during the alleged assaults but that none of those others has come forward to verify the victim's account. But the jury is responsible for determining what inferences can be drawn from the evidence and the weight to give those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Although there were some inconsistencies in the victim's testimony, they were not of the extreme sort that undermines a witness's credibility as a matter of law, and so it remained the

[1] We denied defendant's motion to remand to the trial court in order to file a motion for new trial based on the great weight of the evidence. *People v Karlskin*, unpublished order of the Court of Appeals, entered February 11, 2013 (Docket No. 310734).

responsibility of the jury to determine her credibility. It was also permissible for the jury to draw reasonable inferences from the testimony. Because the testimony of a victim of CSC does not need to be corroborated by other evidence, MCL 750.520h; *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010), the absence of additional testimony from those present in the house during the alleged assaults is not fatal. Given the victim's testimony, along with the circumstantial evidence of the offending pictures on defendant's cell phone, we conclude that defendant's convictions were not against the great weight of the evidence.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises four additional issues in his Standard 4 brief. None of the issues were preserved and, therefore, we will review them for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 1205 (1999).

A. SEIZURE OF DEFENDANT'S CELL PHONE

Defendant argues that the police seized his cell phone in violation of his Fourth Amendment rights. We disagree.

The United States Constitution recognizes an individual's right to be free from unreasonable searches and seizures. US Const, Am IV. See also Const 1963, art 1, § 11. This right applies to searches and seizures of both persons and property. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007). But "[t]he protection against unreasonable search and seizure is not violated when a private individual, acting with no knowledge on the part of the police, seizes evidence and voluntarily gives it to the police." *People v Oswald*, 188 Mich App 1, 7; 469 NW2d 306 (1991).

Here, the police did not need a warrant to seize the phone because a private individual turned it over. Kibbe was not operating in concert with the police, who did not know that she had the phone until she turned it over to them. Accordingly, the police did not violate defendant's rights when they seized his cell phone.

B. HEARSAY

Defendant argues there was impermissible testimony admitted and, without the testimony, there was insufficient evidence to support his convictions. We disagree.

As an initial matter, we note that defendant's entire argument for this issue consists of challenging the introduction of certain testimony. Defendant thus frames an evidentiary issue, which is subject to preservation requirements, as one of sufficiency of the evidence, which does not require preservation. See *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). Because defendant raises an issue regarding the admission of certain evidence, we will proceed on that basis.

Hearsay, meaning testimony as to a person's unsworn, out-of-court assertions offered to prove the truth of the matters asserted, is generally inadmissible, subject to several exemptions and exceptions as provided by the rules of evidence. MRE 801-805. If a declarant is unavailable for cross-examination, the erroneous admission of hearsay against a criminal defendant is a

constitutional error in that it violates the defendant's right of confrontation. *People v Tanner*, 222 Mich App 626, 632; 564 NW2d 197 (1997).

Here, defendant asserts that Kibbe's testimony that her children were playing with defendant's cell phone, and that they told her it had nude photos, was hearsay, and that without the testimony, there was insufficient evidence to support his convictions. However, Kibbe's statement that her children told her there were nude pictures on the cell phone was not offered to prove that the phone contained such images, but for the effect it had on Kibbe, which was to look at the images herself, call police, and turn the phone over to them. See MRE 801(c). Accordingly, defendant has shown no violation of his confrontational rights.

C. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct by failing to provide him with a bill of particulars, and charging defendant with several identically worded, indistinguishable counts. We disagree.

1. BILL OF PARTICULARS

MCL 767.44 allows short forms to be used in an indictment, and further provides that "if seasonably requested by the respondent, [the prosecuting attorney] shall furnish a bill of particulars setting up specifically the nature of the offense charged." The trial court has discretion to grant a request for a bill of particulars and should do so when "such particulars are necessary to inform the defendant of the particular offenses intended to be proved against him." *People v Jones*, 75 Mich App 261, 269; 254 NW2d 863 (1977). However, a bill of particulars is not needed when the defendant has attended a preliminary examination and heard the attendant testimony, because participation in such process leaves the defendant "fully informed of both the nature and the elements of the charges against [the defendant]." *Id.* at 270.

Here, defendant does not assert that he requested a bill of particulars. MCL 767.44 specifies that a defendant's right to a bill of particulars depends on such a request. Defendant also attended the preliminary examination, heard the testimony, and was informed of the elements of the crimes with which he was charged. Accordingly, defendant suffered no prejudice for want of a bill of particulars.

2. DOUBLE JEOPARDY

Defendant frames his objections to similarly worded charges as a double jeopardy violation. Both the United States and Michigan constitutions protect an individual "from being placed twice in jeopardy for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004), citing US Const, Am V; Const 1963, art 1, § 15. Double jeopardy doctrine "(1) protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Nutt*, 469 Mich at 574. In determining if a violation of double jeopardy has occurred the key is determining what "same offense" means. *Id.*

Defendant was charged with multiple counts of CSC, each covering different conduct, which is not the same as being retried after acquittal or after conviction of the same offense. See

Nutt, 469 Mich at 574. Further, defendant received separate sentences for the separate counts, for which there was sufficient evidence, as discussed above. Accordingly, there was no double jeopardy violation.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that counsel was ineffective for failing to file a motion to suppress evidence based on the seizure of his cell phone. Because we have concluded that there was no Fourth Amendment violation, it follows that defendant's claim of ineffective assistance of counsel must fail. See *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011) (counsel is not ineffective for failing to advance a meritless position or make a futile motion).

Affirmed.

/s/Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher